

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7526

Petition of Vermont Community Wind Farm LLC)
for a certificate of public good, pursuant to)
30 V.S.A. § 248(j), authorizing the installation and)
operation of a temporary wind measurement tower)
and associated equipment on Susie's Peak in)
Clarendon, Vermont)

Order entered: 10/16/2009

ORDER RE MOTIONS TO RECONSIDER

I. INTRODUCTION

On September 11, 2009, the Town of Clarendon and Vermonters for a Clean Environment ("VCE") each filed requests for reconsideration of the Certificate of Public Good ("CPG") issued in this docket to Vermont Community Wind Farm LLC ("Vermont Community Wind") authorizing the installation and operation of a temporary wind measurement tower in Clarendon Vermont. In its filing, VCE requested a stay.

In this Order, we deny the Town of Clarendon's and VCE's requests for reconsideration and VCE's request for stay.

II. PROCEDURAL HISTORY

On August 28, 2009, the Public Service Board ("Board") issued a CPG to Vermont Community Wind authorizing the installation and operation of a temporary wind measurement tower and associated equipment on Susie's Peak in Clarendon, Vermont.

On September 11, 2009, the Town of Clarendon filed a motion for reconsideration for the CPG issued in this docket. On September 11, 2009, VCE filed a letter requesting the Board reconsider its approval of the wind measurement tower in this docket.

On October 2, 2009, Vermont Community Wind filed a response opposing the Town of Clarendon's motion for reconsideration and VCE's request for reconsideration.

On October 12, 2009, the Town of Clarendon filed a reply to Vermont Community Wind's October 2 response.

The Board received twenty public comments on its decision to grant Vermont Community Wind a CPG authorizing the installation of a temporary wind measurement tower, which are summarized in Section IV of this Order.¹

III. MOTIONS TO RECONSIDER

In its motion for reconsideration, the Town of Clarendon claims that the Board has "misapplied the so-called *Quechee* test." The Town of Clarendon argues that the test requires a two-pronged analysis, which the Board first required to determine whether the proposed project will have an adverse aesthetic impact and if the answer is in the affirmative, to determine if the adverse impact would be "undue."² The Town of Clarendon states the "Board does not seem to analyze the second prong of the *Quechee* test so presumably it believed that this project would not have an adverse impact on scenic and natural beauty."³ The Town contends that "a guyed galvanized steel tower, 197 feet in height and 6 to 10 inches in diameter on a ridgeline can not be said to be in harmony with its surroundings." The Town of Clarendon further argues that, since the Board did not analyze the three tests in the second prong of *Quechee*, the removal of the tower after five years does not have any bearing on aesthetics.

In its September 11 letter requesting reconsideration, VCE states that the Board "has received substantial information about the company's inappropriate activities in the community and lack of compliance with well-known rules and procedures." VCE presents several reasons why the Board should not have granted Vermont Community Wind a CPG: (1) Vermont Community Wind has provided false and misleading information to the Board in its initial filing; (2) Vermont Community Wind has trespassed on private property and placed bird and bat

1. Nineteen of the commenters' filings also addressed the measurement tower in Docket 7518.

2. The Town of Clarendon cites *In re McShinsky*, 153 Vt. 586, 591, 592, and *In re Halnon*, 174 Vt. 514, 515.

3. The Town of Clarendon cites *In re UPC Vermont Wind, LLC*, 2009 Vt. 19.

monitoring devices on private property without landowner permission in Ira and Middletown Springs; (3) Vermont Community Wind submitted lease agreements that do not include deed easement details; and (4) the Board ignored the aesthetic impacts that the proposed project would have on the Tinmouth Channel.

VCE states its disagreement with the Board's conclusion that a public hearing was not necessary in this docket, arguing that the number of public comments received indicated the necessity for a public hearing.

VCE also contends that Vermont Community Wind has raised environmental stewardship issues by its September 10, 2009, activity in Ira. VCE states that Ira residents have encountered Vermont Community Wind contractors carrying wind monitoring equipment who appeared to be lost and asked for directions. VCE argues that, by not providing its contractors with adequate information to conduct their jobs in a manner that is not disruptive to the public, the company has shown a "total disregard for public process, public concerns, and public and private property."

VCE requested a stay, so that the proposed wind measurement towers are not to be constructed until all the issues raised in its reconsideration request are addressed and resolved.

In its October 2 response, Vermont Community Wind contends that the inquiry under a motion for reconsideration is limited, and that a reconsideration motion is not a "vehicle for relitigating old issues, presenting the case under new theories," or to "allow parties to correct previous tactical decisions."⁴ With regard to the Town of Clarendon's motion, Vermont Community Wind asserts that the Town cannot properly request reconsideration of aesthetics because it did not submit any prior comments on this issue. Vermont Community Wind argues that if the Board were to consider the merits of the Town's contentions, the Board had properly concluded that the temporary wind measurement tower does not pose unduly adverse impacts to aesthetics, consistent with the record evidence. Vermont Community Wind also claims that the Board's reasoning was consistent with the analysis and conclusions in other dockets which

4. Vermont Community Wind cites *Kirkpatrick v. Merit Behavioral Care Corp.*, 128 F. Supp. 2d 186, 190 (D. Vt., 2000); *Drumheller v. Drumheller*, 2009 VT 23 ¶ 29; Docket No. 6651, Order of 10/6/06 at 2.

reviewed proposed wind measurement towers with similar characteristics.⁵ Vermont Community Wind further contends that the temporary nature of the tower is relevant in deciding whether the tower would be adverse given that the tower's visibility will not be permanent.⁶

Vermont Community Wind argues that VCE's request for reconsideration should be denied because it raises no issues to compel reconsideration and largely repeats earlier claims that are irrelevant to the Board's review of the substantive Section 248 criteria. Vermont Community Wind further contends that VCE's arguments either "try for a second bite at the apple by repeating and repackaging previously presented arguments that are irrelevant and/or unsupported," or improperly address issues for the first time. Vermont Community Wind argues that VCE fails to point to controlling decisions or data that the Board overlooked that could reasonably support reversal.⁷

With regard to VCE's contentions regarding environmental stewardship, Vermont Community Wind contends that the anecdote is irrelevant, hearsay, and inaccurate, and meant to "infect the company's reputation in front of the Board, state agencies, and others."

Vermont Community Wind opposes VCE's request for a stay. Vermont Community Wind argues that VCE has "shown no irreparable harm to itself or others, no likelihood of success on the merits, and no reason why the public interest is served by delaying this project."⁸

In its October 12 reply, the Town of Clarendon argues that its motion for reconsideration was not a "second bite at the apple." The Town contends that a mistake of law and/or fact was made and its motion presents an opportunity for the Board to correct any errors in its August 28 Order and CPG.⁹

5. Vermont Community Wind cites Docket 6786, Order of 1/29/03 at 8-9; Docket 6784, Order of 1/29/03 at 10-12; Docket 6884, Order of 4/21/04 at 14; Docket 6748, Order of 10/4/02 at 8-10.

6. Vermont Community Wind cites Docket 7314, Order of 5/29/08 at 40.

7. Vermont Community Wind cites *Shrader*, 70 F.3d at 257.

8. Vermont Community Wind cites *In re J.G.*, 160 Vt. 250, 255 n.2 (1993).

9. The Town of Clarendon cites *Osborn v. Osborn*, 147 Vt. 432, 433 (1986).

IV. PUBLIC COMMENTS

Twenty interested parties in the project area submitted comments requesting reconsideration. A few commenters objected to a possible wind generation project. Some called for a public hearing. One commenter requested that the Board conduct a site visit. One commenter requested a stay in the proceeding.

In their requests for reconsideration, commenters also raised the issue of visual impacts, including impacts on the Tinmouth Channel, environmental impacts on the proposed access routes, and the impacts of the proposed tree clearings. Some commenters raised concerns about increased traffic on access roads, and economic impact on property values. Other commenters believed that the five-year length of the wind-measurement project was arbitrary and excessive. Several commenters raised concerns that Vermont Community Wind had trespassed on private property and had not obtained permission for access to proposed project properties. A few commenters raised concerns that Vermont Community Wind provided inaccurate and misleading information and had disregard for Vermont laws and procedures. One commenter stated that the proposed project violates the zoning ordinances of Clarendon and violates the Clarendon Town Plan.

V. DISCUSSION AND CONCLUSIONS

The purpose of a motion for reconsideration is for the Board to reconsider "issues previously before it," and to "examine the correctness of the judgment itself."¹⁰ Reconsideration is not intended to allow a party to present evidence or issues that it failed to present earlier.¹¹

In its comments in response to the initial petition in this docket, the Town of Clarendon raised concerns with regard to the Town's zoning regulations and Town plan, as well as health and wildlife impacts. In the August 28 Order approving the proposed measurement tower, the Board concluded that the petition had effectively addressed the issues raised with respect to the

10. *In re Robinson/Keir Partnership*, 154 Vt. 50, 54 (1990); *see also* Docket No. 6651, *In re Verizon Wireless*, Order of 10/6/06 at 2.

11. *Rubin v. Sterling Enterprises*, 164 Vt. 582, 589 (1996).

criteria of Section 248. In its motion for reconsideration, the Town of Clarendon, for the first time, raised aesthetics issues and that the Board had misapplied the *Quechee* test.

Pursuant to the Section 248(j) process, the Board provides notice to statutory parties and any other interested persons that there is the opportunity to submit comments as to whether the petition raises a significant issue with respect to the substantive criteria of Section 248. This requirement allows the Board to determine the scope of any further investigation or hearings related to the petition in a timely manner. This requirement also allows the petitioner the opportunity to respond to any comments prior to further investigation.

While the Town of Clarendon filed comments on the project within the required comment period, these comments did not deal with the aesthetic impacts of the project. It appears that the Town of Clarendon is seeking to use the motion for reconsideration as a means of filing additional comments on the project that should have been filed earlier. The Town of Clarendon offers no explanation as to why aesthetic concerns were not raised within the initial comment period. Because the Town of Clarendon failed to raise aesthetics issues within the prescribed comment period, the motion for reconsideration is denied.

Even if the Town of Clarendon had raised these issues in a timely manner, we find arguments in the motion unpersuasive. In the August 28 Order, the Board properly applied the *Quechee* test. We concluded that the proposed wind measurement tower will not have adverse effect on the aesthetics of the area, and therefore we did not need to examine if the adverse impact would be "undue." This conclusion is supported by the evidence in the record and we find no basis in the Town's filing to conclude that our August 28, 2009, decision was incorrect.

Furthermore, we disagree with the Town's conclusion that the removal of the tower in five years does not have any bearing on aesthetics. The temporary nature of the tower is relevant in deciding whether there is adverse impact given that the tower's visibility will not be permanent. In addition, in our August 28 Order the question before us was whether, based on the petition and the comments received, a significant aesthetics issue had been raised. We determined that no such significant issue had been presented. The Town of Clarendon has failed to demonstrate that our determination of no significant aesthetic impact was incorrect. For these reasons, we deny the Town of Clarendon's motion for reconsideration.

In its request for reconsideration, VCE raises concerns with regard to misleading information, trespassing, and lease agreements that it raised in previous filings to the Board. The Board addressed these concerns in the August 28 Order. The arguments raised in VCE's filing are unpersuasive and do not lead us to conclude that our August 28, 2009, decision was incorrect.

VCE claims that the Board ignored the visual impacts the proposed towers would have on the Tinmouth Channel. The evidence in the record indicates that the northern edge of the Tinmouth Channel closest to the proposed tower is almost one-and-a-half miles away.¹² The August 28 Order correctly concluded that most of the locations from which the tower could be seen are more than a mile away.

VCE disagrees with the Board's conclusion that a public hearing was not necessary in this docket. As we concluded in our August 28 Order, because the petition effectively addressed the Section 248 criteria and because the comprehensive nature of the public comments received during the Section 248(j) process sufficiently addresses the issues, we continue to conclude that a public hearing is not necessary.

With regard to VCE's concerns about Vermont Community Wind's environmental stewardship, we conclude that the information is unsupported and hearsay. Therefore, we find the arguments in VCE's request unpersuasive and we deny VCE's request for reconsideration.

VCE has requested that we issue a stay until the issues it presents in its request for reconsideration have been addressed and resolved. Because we have denied VCE's request for reconsideration, we also deny its request for a stay.¹³

Most of the public comments raised issues that had been addressed in the August 28 Order. A few commenters raised a new concern regarding the five-year timeframe for operation of the proposed wind measurement tower. This timeframe is supported by the petition and consistent with the Board's approval of other wind measurement towers.

12. Docket 7526, White-Hansen supp. pf. at 4.

13. We also note that VCE failed to address the factors to be considered in determining whether to grant a stay. In evaluating a request to stay the effect of a Board order pending an appeal, the Board typically considers four factors: (1) the likelihood of success of the appealing party on the merits; (2) whether the party seeking the stay will suffer irreparable injury if the stay is not granted; (3) whether the issuance of a stay will substantially harm other parties; and (4) the location of the best interests of the public. *See In re Tariff Filing of New England Telephone & Telegraph Co.*, 145 Vt. 309, 488 A.2d 746 (1984). VCE does not make any claims regarding these four factors.

Finally, the August 28 Order authorized Vermont Community Wind to install and operate a temporary wind measurement tower. While measurement towers are necessary precursors for a wind generation facility, the Board's approval of a wind measurement tower is not a prejudgment as to any future petition for a wind generation facility. The Board has denied approval of a petition for a wind generation facility after approval of a temporary wind measurement tower.¹⁴ Any subsequent request for approval to construct a wind generation facility will be subject to a separate proceeding and will include a public hearing as part of the Section 248 process.

So ORDERED.

Dated at Montpelier, Vermont, this 16th day of October, 2009.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: October 16, 2009

ATTEST: s/Judith C. Whitney
Deputy Clerk of the Board

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.

14. Docket 6748, Order of 10/4/02, approving wind measurement tower on East Mountain; Docket 6911, Order of 7/17/06, denying the wind generating facility proposed for the site.